Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

Isidoro Rodriguez, Esq.,

Petitioner,

v.

Jack Harbeston, Sea Search Armada, Armada Company, IOTA Partners, and Idaho Limited Partnership, and Danilo Davis Pereira,

Respondents.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IN THIS ACTION BASED ONLY ON DIVERSITY OF CITIZENSHIP, WHERE NO FEDERAL ISSUE IS INVOLVED, DID THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT COMMIT REVERSIBLE ERROR UNDER *ERIE R.R. v TOMPKINS*, AND *SALVA REGINA COLLEGE v. RUSSELL*, IN NOT PROVIDING *DE NOVO* REVIEW OF THE DISTRICT COURT'S DISDAIN OF ITS DUTY TO ASCERTAIN THE CONTENT OF THE COMMONWEALTH OF VIRGINIA'S SUBSTANTIVE LAWS AS TO THE ENFORCEMENT AND PROTECTION OF A VIRGINIA ATTORNEY'S LIEN, AND BAR LEGAL ETHICS OPINION?

I. DID THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT COMMIT REVERSIBLE ERROR IN NOT GRANTING THE MOTION FOR A CERTIFICATION TO THE SUPREME COURT OF VIRGINIA ON THE QUESTION OF VIRGINIA'S SUBSTANTIVE LAWS AS TO THE ENFORCEMENT AND PROTECTION OF A VIRGINIA ATTORNEY'S LIEN, AND BAR LEGAL ETHICS OPINION?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CITED AUTHORITIES iv

CITATIONS TO OPINIONS BELOW ..... -1-

STATEMENT OF JURISDICTION ..... -3-

VIRGINIA STATUTORY PROVISIONS INVOLVED ..... -3-

STATEMENT OF THE CASE ..... -4-

i. Proceeding below against SSA Group ..... -7-

i. Proceeding below against Mr. Davis ..... -8-

REASONS FOR GRANTING THE WRIT OF CERTIORARI ..... -10-

I. The Decisions Below Conflict With Precedents of the this Court and All Other Courts of Appeals Regarding the Ultimate Duty of the Fourth Circuit to Apply the Substantive Laws of the State in which the District Court sits, in the instant action Virginia, to Comply with the Precedents of the Supreme Court of Virginia As To The Enforcement And Protection Of A Virginia Attorney's Lien, And Virginia Bar Legal Ethics Opinion ..... -11-

II The Decisions Below Conflict With Those of The U.S. Court Of Appeals For The Seventh Circuit Regarding The Duty of A Circuit Court To Seek Certification To The Supreme Court of a State On a Question as to the Substantive Law of Said State ..... -17-

CONCLUSION ..... -20-

APPENDIX

TABLE OF CITED AUTHORITIES

Cases:

Allstate Insurance Company, as Subrogee of Sam Lakhia, V. Menards, Incorporated, No. 01-2139, http://laws.findlaw.com/7th/012139.html ..... -14- ..... -15-, -16-,-17-, -18-, -19-

Allen v. Transamerica Ins. Co., 128 F.3d 462 (7th Cir. 1997) ..... -17-

Allstate Insurance v. West Virginia State Bar, 4th Cir. No. 98-1537, November 30, 2000 ..... -12-

Burger King v. Rudzewicz, 471 U.S. 462 (1985) ..... -15-

Calder v. Jones 465 U.S. 783 (1984) ..... -15-

Dollar Sav. Bank v. First Sec. Bank of Utah, N.A., 746 F.2d 208 (3d Cir 1984) ..... -15-

English & Smith v. Metzger, 901 F.2d 36 (4th Cir. 1990) ..... -12-

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) ..... -15-, -16-, -17-, -18-

Fary v. Aquino, 218 Va. 889, 241 S.E. 2d 799 (1978) ..... -12-

General Electric Company v. Deutz AG, 3rd Cir. U.S. Ct of App. Docket No. 00-2387 (October 31, 2001) . . . . . -16-

Guaranty Trust Co v. York, 326 U.S. 99, 65 S.Ct 1464 (1945) . . . . . -16-

Heinzman v. Fine, Fine, Legum & Fine, 217Va. 958, 234 S.E.2d 282 (1977) . . . . . -14-

Hughes v. Cole, 251 Va. 3, 465 S.E.2d 820(1996) . . . . . -11-

I.T. Sales, Inc. v. Dry, 222 Va. 6, 278 S.E.2d 789 (Va. 1981) . . . . . -13-

In re Funk, 2 F. Supp 555 (W.D. Va. 1932) . . . . -12-

In the Matter of Istem, Inc. Respondent, v. Chemical Bank Respondent, and Wilkie Farr Gallagher, Appellant, 78 N.Y.2d 342, 581 N.E.2d 1042, 575 N.Y.S.2d 796 (1991) . . . . . -12-

John R. Neal and Lea a. Neal v. Sjef Janseen, 6th Cir. U.S. Ct of App. Docket No. 98-00119, Elect cite: 2001 Fed App 0379P(6th Cir.)(October 23, 2001) . . . -15-

Katopodis V. Liberian S/T Olympic Sun, 282 F.Supp. 369 (E.D. Va 1968)\ . . . . . -13-

Masselli & Lane, PC, v. Miller & Schuh, PA, et al., 4th Cir No. 99-2440, 2000 U.S. App. LEXIS 11932 (May 30, 2000) ..... -13-

Montavon v. United States, 864 F.Supp. 519 (E.D.Va 1994) ..... -13-

Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994) ..... -16-

Roberts v. S. Life Ins. Co., 568 F. Supp. 536 (N.D. Ill. 1983) ..... -16-

Ruebush v. Funk, 63 F.2d. 170 (4th Cir. 1933) .. -12-

Salva Regina College v. Russell, 499 U.S. 225 (1991) 14

Superfos Investments Ltd. v. FirstMiss Fertilizer, Inc., 774 F. Supp. 393 (E.D. Va. 1991) ..... -12-

Tignor v. Parkison, 729 F.2d. 977 (4th Cir. 1984) ..... -12-

Wein Air Alaska v. Brandt, 195 F.3d 208 (5th Cir. 1999) ..... -15-

Constitution, and Statutes:

U.S. Const. Art. III, sec. 2, cl. 1 ..... -17-

28 U.S.C. § 1332 ..... -4-, -12-

28 U.S.C.A. § 1738 (West 2000) . . . . . -12-

VA Code § 54.1-3910 . . . . . -12-, -18-

Virginia Attorney's Lien VA Code § 54.1-3932 . . . . . -4-, -10-, -11-, -12-, -13-, -16-, -18-

Virginia's Long Arm Statute, Virginia Code §8.01-328.1(A)(1) . . . . . -4-, -7- -12-, -16-

Virginia's Long Arm Statute, Virginia Code §8.01-328.1(A)(4) . . . . . -4-, -7- -12-, -16-

Miscellaneous:

19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d sec. 4507 . . . . . -17-

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Isidoro Rodriguez, Esq. ("Mr. Rodriguez, Esq."), prays that a writ of certiorari be issued to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), entered in this proceeding on May 14, 2001, June 12, 2001, June 19, 2001, July 24, 2001, July 26, 2001, November 28, 2001, and January 18, 2002.

CITATIONS TO OPINIONS BELOW

a. The unpublished order of the Fourth Circuit, denying a Petition for Rehearing En Banc, No. 01-1884, January 18, 2002, is reprinted at A-1;[1] the unpublished opinion of the Fourth Circuit No. 01-1884, November 28, 2001, is reprinted at A-2;

b. The unpublished opinion of the Fourth Circuit No. 01-1774, July 26, 2001, denying a Petition for Writ of Mandamus to the Hon. Judge Gerald Bruce Lee, U.S. District Court of the E. D. of Virginia is - reprinted at A-8;

c. The unpublished orders of the Fourth Circuit No. 01-1671, June 12, 2001, and July 24, 2001, deny-

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[1]"A-" references are to pages in the Appendix.

ing a Petition for Writ of Mandamus to the Hon. Judge James C. Cacheris, U. S. District Court of the E. D. of Virginia are reprinted respectively at A-13 and A-10;

d. The unpublished orders of the Fourth Circuit No. 01-1129, dated June 19, 2001, and May 14, 2001, dismissing an Interlocutory Appeal of the December 20, 2000 order, are reprinted at A-11 and A-25;

e. The unpublished Order and Memorandum of the Hon. Judge Gerald Bruce Lee, U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, June 5, 2001, dismissing the Complaint as to Respondent Danilo Davis Pereira, is reprinted at A-14; and the unpublished Report and Recommendation of the Hon. Magistrate Judge Theresa Carroll Buchanan of the U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, April 25, 2001, is reprinted at A-27;

f. The unpublished Prepared Bench Opinion and Order of the Hon. Judge James C. Cacheris of the U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, December 20 and 21, 2000, dismissing the Complaint as to Respondents Mr. Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners, are reprinted at A-45 and 52; and,

g. Virginia Bar Legal Ethics Opinion #1325, February 27, 1990, confirming Petitioner Isidoro Rodriguez, Esq., Virginia Attorney's Lien is reprinted at A-54.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit denying a Petition for Rehearing En Banc was entered on January 18, 2002 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VIRGINIA STATUTORY PROVISIONS INVOLVED

Virginia Code § 54.1-3932. Lien for fees.

Any person having or claiming a right of action sounding in . . . contract, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause of action or claim. . . .

Virginia Code § 8.01-328.1.

When personal jurisdiction over person may be exercised.

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

1. Transacting any business in this Commonwealth;...;

4. Causing tortuous injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly . . .engages in any other persistent course of conduct, or derives substantial revenue from . . . services rendered, in this Commonwealth;. . .

STATEMENT OF THE CASE

This action based only on diversity of citizenship, where no federal issues is involved, was brought pursuant to 28 U.S.C. §1332, and Virginia's Long Arm Statute, Virginia Code § 8.01-328.1(A)(1) and (4), on September 12, 2000, in the United States District Court for the Eastern District of Virginia, Alexandria. The gravamen of the Complaint sought to enforce Mr. Rodriguez, Esq.'s Virginia Attorney's Lien under Virginia Code §54.1-3932, confirmed by Virginia Bar Legal Ethics Opinion # 1327 ("VA Bar Legal Ethics Opinion"), February 27, 1990 (A-54), and sought to protect said Attorney's Lien and VA Bar Ethics Opinion from tortuous interference by acts outside of Virginia, directed into the State against Mr. Rodriguez.

Mr. Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners ("SSA Group"), are the claimants to over seven treasure trove targets sunk off of Colombia valued at $1.5 to $10 Billion (A-55), which were claimed and would be the subject of contract litigation against Republic of Colombia ("Colombia"). This litigation was described by Congressman Dan Burton, as the " . . . largest private [contract] claim by American citizens against a foreign state pending in the world . . . . "

To establish Colombia Civil Code jurisdiction so be able to sue in Colombia, SSA Group initiated contact Mr. Rodriguez, Esq. After negotiations they entered into verbal contract from the State of Washington,

executed a written hourly fee contract in State of Idaho, which were Consularized in Washington, D.C., in September to December, 1988. Mr. Rodriguez, Esq., given the authority of Legal Representative and Managing Attorney of the Colombian litigation (A-55).[2]

Subsequently, as Legal Representative of SSA Group, Mr. Rodriguez, Esq., retained Danilo Davis Pereira ("Mr. Davis"), as his agent and local Colombian attorney, who knowingly agreed to comply with Virginia Bar Legal Ethics Opinions(A-56, ¶4), and to a 50/50 fee splitting arrangement .

In 1990, When SSA Group failed to pay over $150,000.00 USD of fees and costs owed, Mr. Rodriguez, Esq. sought and received a VA Bar Legal Ethics Opinion (A-54) permitting him to sue to enforce his Virginia Attorney's Lien. It stated in relevant part that,

> **. . . [Mr. Rodriguez, Esq. being] admitted to practice in Virginia is subject to the Virginia Code of Professional Responsibility although engaged in practice elsewhere. . . when [he] assumes the responsibility of acting as a**

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[2]SSA Group wanted Mr. Rodriguez, Esq., legal services because as a Virginia attorney he was accountable to them in the United States via the Virginia Bar (A-57), and was recommended by the U. S. State Department due to his previous senior level U.S. government background, and international legal experience in Colombia (A-40).

> **fiduciary . . . As such Mr. Rodriguez, Esq.'s suit for Attorney fees is permissible.** (A-57) (Emphasis added)..

On being given notice of the VA Bar Legal Ethics Opinion and Virginia Attorney's Lien, SSA Group entered into a supplemental contingency fee agreement with Mr. Rodriguez, Esq. in December, 1990, to avoid the claim for outstanding fees owed, and to assure continuation of the fiduciary and litigation management services of Mr. Rodriguez, Esq., as a Virginia attorney (A-43).

After receiving 12 years of legal service, including prevailing on any jurisdictional challenge based on Mr. Rodriguez, Esq. residing in Colombia between 1993 to 199, and entering into negotiations with Colombia in the Summer of 1998, to resolve SSA Group's claim, Mr. Jack Harbeston sent a letter on April 6, 2000, into Virginia dismissing Mr. Rodriguez, Esq., as Legal Representative/Managing Attorney, in violation of the hourly fee contract of 1988, and the contingency fee agreement of December, 1990 without cause or authorization of the Board of Directors of SSA Group, and instructed that,

> [any] and all understanding regarding your fees are set forth in an agreement between you and Danilo Davis, and neither Sea Search Armada nor its related entities and individuals owe [Mr. Rodriguez] anything for past, present, or future fees.

i. Proceeding below against SSA Group

On December 20, 2000, after oral argument, from the bench the District Court issued a prepared opinion granting SSA Group's FRCP Rule 12(b)(2) motion to dismiss, without prejudice, based on it finding that there were insufficient connection to Virginia to establish personal jurisdiction over SSA Group to enforce a simple contract (A-48)[3]. The Court left Mr. Davis, as the sole remaining defendant in this case (A-34 and A-52). The Court failed to consider in any manner the facts in light of the substantive laws of Virginia, under Virginia Code §8.01-328.1(A)(1), to enforce Mr. Rodriguez's Attorney's Lien against SSA Group; and, second, pursuant to Virginia Code §8.01-328.1(A)(4), to protect said Attorney's Lien against acts of tortuous interference by SSA Group and Mr. Davis, while they both were engaged in a "persistent course of

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[3]The District Court disregarding the request for jury trial on all issues of facts, in an error focused on facts(A-45 and A-22), involved with alleged fraud in the inducement and lack of consideration on the part of Mr. Davis, and thereby challenged the validity of a subsequent attorneys fee splitting agreement dated March 15, 1991, between Mr. Rodriguez, Esq. and Mr. Davis, changing their respective shares in the contingency fee for 50/50, to 80/20, in favor of Mr. Davis. Apparently SSA Group in their dismissal letter of April 6, 2000, is referring to this fee splitting dispute. However, this fee splitting dispute would not effect rights of Mr. Rodriguez, Esq. to compensation under his Virginia Attorney's Lien, to either a 50% or 20% fee.

conduct" of benefitting from the fiduciary and litigation management service of Mr. Rodriguez as a Virginia attorney (A-39 to A-45).

On January 16, 2001, an interlocutory appeal was filed with the Fourth Circuit, No. 01-1129, due to the District Court's failure to comply with the substantive laws of Virginia. On May 14, 2001, the Fourth Circuit issued an unpublished order dismissing the Interlocutory Appeal (A-25). On May 22, 2001, a Petition for Rehearing En Banc of No. 01-1129; and a Petition for Writ of Mandamus, No. 01-1671, on the same issue of failing to comply with the substantive laws regarding the enforcement and protection of Mr. Rodriguez's Virginia Attorney's Lien were filed.

On June 12, 2001, the Fourth Circuit denied the Petition for a Writ of Mandamus, No. 01-1671 (A-13). On June 19, 2001, an unpublished order denied the petition for rehearing en banc was issued No. 01-1129 (A-11). On June 19, 2001, a Petition for Rehearing En Banc was filed No. 01-1671. On July 24, 2001, the Petition for Rehearing En Banc was denied No. 01-1671 (A-10).

i. Proceeding below against Mr. Davis

Regarding the remaining action against Mr. Davis, on June 5, 2001, in an unpublished decision the Hon. District Court Judge Gerald Bruce Lee, dismissed the remaining Complaint as to Mr. Davis, without

prejudice.[4] Although recognizing the rights of Mr. Rodriguez to his Virginia Attorney's Lien and VA Bar Ethics Opinion under the substantive laws of Virginia, the Court, without citing to any authority, held that jurisdiction over Mr. Davis was improper to protect it against tortuous interference.(A-22).

On June 25, 2001, a timely Notice of Appeal was filed with the Fourth Circuit No. 01-1884, of the orders of December 21, 2000, and June 5, 2001[5], for failure to comply with the substantive laws of Virginia.

On October 29, 2001, a Motion for Certification of the Question to the Supreme Court of Virginia was filed regarding the applicability of the State's Long Arm Statute VA Code § 8.01-328.1 (A)(1) and (4) to enforce and protect the VA Legal Ethics Opinion and the Attorney's Lien (A-5).

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[4] On April 25, 2001, the Magistrate Judge Theresa Carroll Buchanan, issued a Report and Recommendation to dismiss the complaint as one grounded on a simple contract, without considering Mr. Rodriguez's rights under the VA Bar Legal Ethics Opinion or Virginia Attorney's Lien (A-27).

[5] On June 13, 2001, Mr. Rodriguez, Esq., filed a Petition for Writ of Mandamus with the Fourth Circuit No. 01-1774, directed to the Hon. Judge Lee seeking his compliance with the substantive laws of Virginia on enforcement and protection of Mr. Rodriguez's Virginia Attorney's Lien. On July 26, 2001, in an unpublished decision the Petition for a Writ of Mandamus was denied (A-8).

On November 28, 2001, the Fourth Circuit issued an unpublished opinion again failing to comply with the substantive laws of Virginia regarding the enforcement and protection of a Virginia Attorney's Lien; and further denied the Motion for certification of the question to the Supreme Court of Virginia (A-2). On December 4, 2001, a Petition for Rehearing En Banc was filed. On January 18, 2002, this was denied (A-1).[6]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court's review of the Fourth Circuit's decisions is warranted because the Fourth Circuit, (i) "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;" (ii) "has decided an important federal question in a way that conflicts with a decision by a state court of last resort;" and, (iii) "has decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10 (a) and (c).

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[6] On January 28, 2002, a Petition for a Writ of Mandamus was filed with this Court, No. 01-1116, seeking an order to both the Fourth Circuit, and the District Court, directing their compliance with the substantive laws of Virginia on Attorney's Liens. This Petition was denied on April 1, 2002.

I. **The Decisions Below Conflict With Precedents of the this Court and All Other Courts of Appeals Regarding the Ultimate Duty of the Fourth Circuit to Apply the Substantive Laws of the State in which the District Court sits, in the instant action Virginia, to Comply with the Precedents of the Supreme Court of Virginia As To The Enforcement And Protection Of A Virginia Attorney's Lien, And Virginia Bar Legal Ethics Opinion.**

The Supreme Court of Virginia held that the language of, VA Code § 54.1-3932 ("Virginia Attorney's Lien", provides that

> . . .'any attorney [employed] to prosecute [a claim sounding in tort or in contract] shall have a lien upon the cause of action as security for his fees for *any services* rendered in relations to the cause or claim.' (Emphasis in the opinion). **This language is broad and permits no interpretation limiting the benefits of the statute to Virginia lawyers**. . . ."(Emphasis added). *Hughes v. Cole,* 251 Va. 3 at 27, 465 S.E.2d 820(1996)

Under the substantive laws of Virginia, (A-58), Mr. Rodriguez's Attorney's Lien came into existence immediately upon making the hourly fee contract of employment in September 1988, and then the contingency fee contract in December, 1990, with SSA

Group, pursuant to Va Legal Ethics Opinion (A-55).[7] *Fary v. Aquino*, 218 Va. 889, 241 S.E. 2d 799 (1978). *See also. In re Funk*, 2 F. Supp 555 (W.D. Va. 1932); *Ruebush v. Funk*, 63 F.2d. 170 (4th Cir. 1933); *Tignor v. Parkison*, 729 F.2d. 977 (4th Cir. 1984).

In *English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990), not a VA Attorney's Lien, case, but rather involving fee splitting arrangement between attorneys, the Fourth Circuit found personal jurisdiction due to the nonresident attorney in California initiating the relationship of retaining a Virginia attorney, thus the nonresident for purposes of Virginia's Long Arm statute transacted business in Virginia. See also, *Superfos Investments Ltd. v. FirstMiss Fertilizer, Inc.*,

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[7]"The Virginia State Bar shall act as an administrative agency of the [Virginia Supreme] Court . . . . All advisory opinions . . . shall be incorporated into the Code of Virginia . . . ."VA Code § 54.1-3910. Thus Virginia has the undisputed interest in protecting Mr. Rodriguez's Esq. ability to be paid for legal services rendered outside of Virginia were at all times controlled by the Virginia Bar(A-54 and A-57). To do otherwise would be unjust. *See Allstate Insurance v. West Virginia State Bar*, 4th Cir. No. 98-1537, November 30, 2000. Although SSA Group and Mr. Davis are residents of either the States of Washington, Idaho or Colombia, there is no contrary interest to suggest that Virginia's public policies should not control. *See In the Matter of Istem, Inc. Respondent, v. Chemical Bank Respondent, and Wilkie Farr Gallagher, Appellant*, 78 N.Y.2d 342, 581 N.E.2d 1042, 575 N.Y.S.2d 796 (1991).

774 F. Supp. 393, 397 (E.D. Va. 1991)(citing *I.T. Sales, Inc. v. Dry*, 222 Va. 6, 278 S.E.2d 789 (Va. 1981);*Masselli & Lane, PC, v. Miller & Schuh, PA, et al.*, 4th Cir No. 99-2440, 2000 U.S. App. LEXIS 11932 (May 30, 2000). Similarly, because SSA Group transacted business in Virginia by initiating contact, and then entering into an hourly fee and contingent fee contract with Mr. Rodriguez, Esq., so to gain the "benefits and protections" of Virginia law (A-54); and Mr. Davis transacted business in Virginia by specifically understanding and accepting that he served as agent of Mr. Rodriguez, Esq., and specifically waiving any rights under Colombian law to gain "benefits and protections" of the laws of Virginia (A-56, ¶4) Mr. Rodriguez, Esq., Virginia Attorney's Lien and VA Legal Ethics Opinion provide the sufficient "minimum contacts," for purposes of Virginia's Long Arm Statute, VA Code § 8.01-328.1 (A)(1).

Furthermore, pursuant to the laws of Virginia, Mr. Rodriguez, Esq. Attorney's Lien makes him become a party in interest in the contract litigation against Colombia. *Katopodis V. Liberian S/T Olympic Sun*, 282 F.Supp. 369 (E.D. Va 1968); and this Virginia Attorney's Lien remains inchoate until judgement or recovery is obtained. *Montavon v. United States*, 864 F.Supp. 519 (E.D.Va 1994). Thus when in April, 2000, Mr. Rodriguez, Esq, was discharged without just cause, and SSA Group employed Mr. Davis to effect recovery of the claim on the treasure trove, Mr. Rodriguez, Esq. was entitled to a fee based on *quantum merit* for services rendered for the period of September 15, 1988

to April 6, 2000. *Heinzman v. Fine, Fine, Legum & Fine*, 217Va. 958, 234 S.E.2d 282 (1977). Therefore, pursuant to VA Code § 8.01-328.1 (A)(4), SSA Group and Mr. Davis, were "engaged in persistent course of conduct" in using the fiduciary services of a Virginia attorney, while undertaking acts of breach and tortuous interference outside of Virginia, directed at Mr. Rodriguez, Esq.'s equity right in his VA Attorney's Lien.

Consequently, the Court's of Virginia would have found personal jurisdiction to enforce and protect Mr. Rodriguez's VA Attorney's Lien and VA Legal Ethics Opinion pursuant to the above substantive laws of Virginia.

However, in this diversity action the Fourth Circuit and the District Court repeatedly disregarded the substantive law of Virginia, including the decisions in both the Fourth Circuit and its own district, regarding the enforcement a Virginia Attorney's Lien by characterizing the action as one seeking to enforce a simple contract (A-48, A-30, and A-20).[8] Lastly, the Fourth Circuit disregarded this Court's holding in *Salva*

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[8]In the decision of June 5, 2001, the District Court recognized the statutory right of action against SSA Group, but it totally failed to discuss or comply with the substantive laws of Virginia, and 28 U.S.C. § 1738, as to how these rights were to be enforced, or protected from tortuous interference (footnote 3, at A-22)and (A-23). The Court's position was still that to enforce Virginia substantive law, Mr. Rodriguez, Esq., must go to some other jurisdiction (A-49).

Regina College v. Russell, 499 U.S. 225 (1991), by failing to review *de novo* the finding of facts and law supporting the district court's failure to ascertain the content of the substantive law of Virginia regarding the enforcement and protection of a statutory Virginia Attorney's Lien and VA Bar Ethics Opinion.

This Court has held that in diversity cases the federal district courts are bound to follow the substantive law of the state in which the court is sitting, *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Put in the simplest terms, the *Erie* doctrine as developed by this Court since 1938, requires the federal court to apply state substantive laws in determining any issue or claim which has its source in state law.[9] *Calder v. Jones* 465 U.S. 783 (1984); *Burger King v. Rudzewicz*, 471 U.S. 462 at 473 (1985); *Wein Air Alaska v. Brandt*, 195 F.3d 208 (5th Cir. 1999); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1116 (6th Cir. 1994); *John R. Neal and Lea A. Neal v. Sjef Janseen*, 6th Cir. U.S. Ct of App. No. 98-00119, Elect cite: 2001 Fed App 0379P(6th Cir.)(October 23, 2001); *Dollar Sav. Bank v. First Sec. Bank of Utah, N.A.*, 746 F.2d 208 (3d Cir 1984); *General*

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[9] Additionally, 28 U.S.C.A. § 1738 (West 2000), provides in pertinent part, that the Acts of the legislature of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Electric Company v. Deutz AG, 3rd Cir. U.S. Ct of App. No. 00-2387 (October 31, 2001).

As explained on April 5, 2002, by the United States Court of Appeals for the Seventh Circuit, in *Allstate Insurance v. Menards, Inc*, at page 5 of 15, No.01-2139, //laws.findlaw.com/7th/012139.html, to maintain the constitutional line between limited federal lawmaking power and state residual lawmaking power,

> ***Erie* requires that the federal court follow an analytical path that ensures that the law applied in federal proceedings is the law that "ultimately would be applied were the case to be litigated in the state courts."** *Roberts v. S. Life Ins. Co.*, 568 F. Supp. 536, 539-40 (N.D. Ill. 1983) (emphasis added) (footnote omitted).[10]

Furthermore, the Seventh Circuit went on to state that,

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[10] Similarly Justice Frankfurter in *Guaranty Trust Co v. York*, 326 U.S. 99, 65 S.Ct 1464 at 1470 (1945), wrote of the *Erie* decision, that, "[t]he intent of the decision was to insure that, in cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a state court."

> [i]f the mandate of *Erie* is to be satisfied and the law ultimately employed is to be the law of the state, the federal court, exercising its authority to hear diversity cases (citing at footnote 9, U.S. Const. Art. III, sec. 2, cl. 1), must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal. *Allstate Insurance Company*, at 6 of 15. . . . In sum, **we adhere today to the general rule, articulated and applied throughout the United States, that, in determining the content of state law, the federal courts must assume the perspective of the highest court in that state and attempt to ascertain the governing substantive law on the point in question.** See *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466-467 (7th Cir. 1997). See generally 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d sec. 4507 at 157-61. *Allstate Insurance Company*, at 9 of 15 (Emphasis added).

II **The Decisions Below Conflict With Those of The U.S. Court Of Appeals For The Seventh Circuit Regarding The Duty of A Circuit Court To Seek Certification To The Supreme Court of a State On a Question as to the Substantive Law of Said State.**

Mr. Rodriguez, Esq. filed on September 27, 2001, a motion with the Fourth Circuit seeking Certif-

ication to the Supreme Court of Virginia of the above question of personal jurisdiction pursuant to Virginia Long Arm Statute, Va Code § 8.01-328.1(A)(1) and (4), to enforce and protect a Virginia Attorney's Lien VA Code § 54.1-3932, and VA Bar Legal Ethics Opinion, VA Code § 54.1-3910 (A-5). With no explanation, the motion was denied by the Fourth Circuit in its order of November 28, 2001 (A-3).

This was in conflict with the holding of the Seventh Circuit in *Allstate Insurance Company*, *supra*. at pages 9 and 10 of 15, which stated that,

> . . . **federal courts have, . . ., the duty to ascertain the content of state substantive law when called upon to do so in the exercise of the diversity jurisdiction of the federal courts**. Exercising this responsibility is no easy task. . . . Certification of a controlling issue of state law to the highest court of the state is one method of reducing the possibility of error in making an "*Erie* guess."(Emphasis added)

Based on the Seventh Circuit's list of factors the motion for Certification should have been granted because:

(1) of the apparent uncertainty in the Fourth Circuit as to the substantive law of Virginia on the enforcement and protection of Mr. Rodriguez's Attorney's Lien;

(2) the none enforcement and protection of a Virginia Attorney's Lien and VA Legal Ethics Opinion is a matter of public concern;

(3) given the realities of "global" economics of today, the issue of enforcement and protection of a Virginia Attorney's Lien for service outside of Virginia will recur;

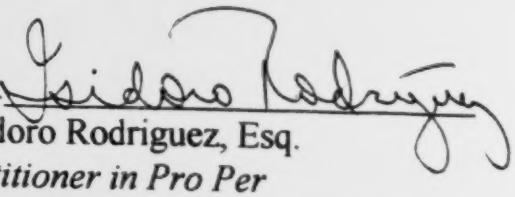
(4) the issue is outcome determinative and the Virginia Supreme Court has not had an opportunity to address the issue of enforcement and protection from tort a Virginia Attorney's Lien and VA Legal Ethics Opinion in any other case; and,

(5) the authority to supervise Virginia Attorney's outside the State is placed into question by the none enforcement of a Virginia Attorney's Lien and Va Legal Ethics Opinion (A-57), and the Virginia Supreme Court would consider the issue an important one in the growth of Virginia's jurisprudence, since the resolution will definitively benefit future litigants. *See Allstate Insurance Company*, *supra*. at pages 9 and 10 of 15.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,



By:
Isidoro Rodriguez, Esq.
Petitioner in Pro Per
Member of Supreme Court Bar

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APPENDIX

Summary of Content of Appendix:

a. Virginia Bar Legal Ethics Opinion #1325, February 27, 1990, Petitioner Isidoro Rodriguez, Esq., Virginia Attorney's Lien ..... A-54.

b. Unpublished order of the Fourth Circuit, denying a Petition for Rehearing En Banc, No. 01-1884, January 18, 2002 ..... A-1

c. Unpublished opinion of the Fourth Circuit No. 01-1884, November 28, 2001 ..... A-2.

d. The five unpublished opinions of the Fourth Circuit failing to comply Virginia Substantive Law on the Virginia Attorney's Lien ..... A-8 to A-25.

e. The unpublished Order and Memorandum of the District Court, E. D. VA, between December 20, 2002, and June 5, 2001, failing to comply Virginia substantive Law on the Virginia Attorney's Lien ..... A-14, A-27, A-45 and 52.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 18, 2002

No. 01-1884
CA-00-1523-A

ISIDORO RODRIGUEZ, Esq
Plaintiff - Appellant

v.

JACK HARBESTON; SEA SEARCH ARMADA; ARMADA COMPANY; IOTA PARTNERS; DANILO DEVIS PEREIRA
Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01—1884

ISIDORO RODRIGUEZ, Esq.,

Plaintiff - Appellant,

versus

JACK HARBESTON; SEA SEARCH ARMADA; ARMADA COMPANY; IOTA PARTNERS; DANILO DEVIS PEREIRA,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-00-1523-A)

Submitted: November 9, 2001 Decided: November 28, 2001

Before LUTTIG, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Isidoro Rodriguez, Appellant Pro Se. R.Harrison Pledger, Jr., Bernard G. Feord, Jr., PLEDGER & FEORD, P.L.C., McLean, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Isidoro Rodriguez appeals the district court orders dismissing his complaint for lack of personal jurisdiction. We review de novo the district court's legal conclusions concerning personal jurisdiction. To the extent that the district court's conclusions are based on findings of fact, however, such findings should not be disturbed unless clearly erroneous. Mylan Lab., Inc. V. Akzo. N.y., 2 F.3d 56, 60 (4th Cir. 1993). Rodriguez bears the burden of showing by a preponderance of the evidence that jurisdiction existed. In re Celotex Corp., 124 F.3d 619, 628 (4th Cir. 1997).

We have reviewed the record and the district court's findings and legal conclusions and find no error. Accordingly, we affirm on the reasoning of the district court. See Rodriguez v. Harbeston, No. CA-00-1523-A (E.D. Va. Dec. 21, 2000 & June 5, 2001). We deny

Rodriguez's motion seeking certification of a question from the Supreme Court of Virginia. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT OF VIRGINIA

ISIDORO RODRIGUEZ,ESQ Appellant, v. JACK HARBESTON, SEA SEARCHARMADA, ARMADA COMPANY, IOTA PARTNERS,and DANILO DAVIS PEREIRA, Appellees.	)	Case No. 01-1884

APPELLANT'S MOTION FOR CERTIFICATION OF QUESTION OF VIRGINIA LAW TO THE SUPREME COURT OF VIRGINIA

COMES NOW Appellant Isidoro Rodriguez, Esq., pursuant to Rule 27 of the Federal Rules of Appellate Procedure and move the Court for a request by this Court seeking certification from the Supreme Court of Virginia as to whether there exist personal jurisdiction pursuant to Virginia Long Arm Statute, Va Code §8.01-328.1(A)(1), to enforce a Virginia Attorney's Lien VA Code §54.1-3932,

and Virginia Legal Ethics Opinion, VA Code§ 54.1-3910, based on the undisputed facts that the fiduciary service of a Virginia attorney controlled by the Virginia State Bar, were sought and intentionally used to manage litigation and maintain standing to sue outside of Virginia for over twelve years; and whether there exist personal jurisdiction pursuant to Virginia Long Arm Statute, Va Code § 8.01-328.1(A)(4), to protect a Virginia Attorney's Lien VA Code § *54.1-3932,* from tortious interference by acts outside of the State of Virginia; and in support thereof states as follows:

1.The Supreme Court of Virginia has original jurisdiction under article IV, section 1 of the Virginia Constitution to "answer questions of state law certified by a court of the United States or the highest appellate court of any other state. This constitutional provision is implemented by Rule 5:42 of the Rules of the Supreme Court of Virginia.

2.The principles that the Supreme Court of Virginia considers when deciding whether to grant certification of a question of law, are that (i) the issue is determinative of the cause, and (ii) there is no controlling Virginia Supreme Court precedent, *See West American Insurance Co. v. Bank of Isle of Wight,* 673 F.Supp. 760 (E.D.Va. 1987), and *Coles v. Jenkins,* 24 F.Supp. *599* (W.D. Va. 1998).

3.In *Hughes v. Cole, 251* Va. 3 at *27,465* S.E.2d 820 (1996), wherein the Supreme Court of Virginia held that the language of Va. Code Ann. § *54.1-3932,* **"is broad and permits no interpretation limiting the benefits of the statute to Virginia lawyers..."**

4. Thus it is the law of the State of Virginia, to

enforce a Virginia Attorney's Lien 'for services performed outside of Virginia.

For these reasons, the Appellant respectfully pray this Court to seek Certification of the above two issues controlled by the Laws of the State of Virginia.

Respectfully submitted,

_____

Isidoro Rodriguez,Esq.

LOCAL RULE 27(a) CERTIFICATION

I hereby certify that counsel for Appellee SSA Group were informed of the intended filing of this motion on September 27, 2001, and that Appellee's Counsel neither indicated that he would consent to the motion nor that he intended to file a response in opposition.

_____

Isidoro Rodriguez, Esq.

THE RODRIGUEZ LAW FIRM
ATTORNEY AND COUNSELLOR AT LAW

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01—1774

In Re: ISIDORO RODRIGUEZ,

Petitioner.

On Petition for Writ of Mandamus.

Submitted:June 29, 2001 Decided: July 26, 2001

Before LUTTIG, MOTZ, and KING, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Isidoro Rodriguez, Petitioner Pro Se.

Unpublished Opinions are not binding precedent in this circuit.
See Local Rule 36(c).

PER CURIAM:

Isidoro Rodriguez filed this mandamus petition requesting that this Court compel the district court to reinstate his complaint, order discovery, convene a jury to determine the facts and to comply with Rule 4(f) of the Federal Rules of Civil Procedure and the inter-American Convention on Letters of Rogatory, 14 Int'l Legal Materials. Mandamus is a drastic remedy to be used only in extraordinary circumstances. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976) . Mandamus relief is only available when there are no other means by which the relief sought could be granted, in re Beard, 811 F.2d 818, 826 (4th Cir. 1987), and may not be used as a substitute for appeal. In re Catawba Indian Tribe, 973 F.2d 1133, 1135 (4th Cir. 1992) The party seeking mandamus relief carries the heavy burden of showing that he has "no other adequate means to attain the relief he desires" and that his entitlement to such relief is "clear and indisputable." Allied Chem. Corp. v. Daiflon, Inc., 449 US. 33, 35 (1980).

Because Rodriguez has not shown that there is not an available remedy or that he is entitled to the requested relief, we deny his petition for mandamus relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 24, 2001

No. 01-1671

In Re: ISIDORO RODRIGUEZ

Petitioner

On Petition for Rehearing En Banc

The Petitioner's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 19, 2001

No. 01-1129
CA-0O-1523-A

ISIDORO RODRIGUEZ

Plaintiff - Appellant

v.

JACK HARBESTON; SEA SEARCH ARMADA;
ARMADA COMPANY; IOTA
PARTNERS

Defendants - Appellees

and

DANILO DEVIS PEREIRA

Defendant

On Petition for Rehearing En Banc

The Appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc.

IT IS ORDERED that the petition for rehearing en banc is
denied.

For the Court

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 12, 2001

No. 01-1671

In Re: ISIDORO RODRIGUEZ
Petitioner

ORDER

Petitioner has filed a petition for writ of mandamus.

The Court denies the petition.

Entered at the direction of Judge Michael, with the concurrence of Judge Williams and Judge Motz.

For the Court

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ISIDORO RODRIGUEZ, ESQ.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	00—1523—A
	)	
DANILO DEVIS PEREIRA,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER is before the Court on the April 25, 2001 Report and Recommendation of Magistrate Judge Theresa Carroll Buchanan addressing Plaintiff's Motion for Stay of Default Proceeding and Motion for Leave to Conduct Nonparty Depositions.

Federal Rule of Civil Procedure 72(b) requires a district judge to whom a magistrate's Report and Recommendation is assigned to "make a de nova determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." FED. R. CIV. P. 72(b). Plaintiff has made a timely written objection to the

magistrate judge's report and recommendation dismissing Plaintiff's claims against Defendant Danilo Devis Pereira for lack of personal jurisdiction. Therefore, the issue before the Court is whether the exercise of personal jurisdiction over Defendant is proper in that this Court may not exercise personal jurisdiction over Defendant. Therefore, the Court adopts the Report and Recommendation of Magistrate Judge Buchanan. Accordingly, Plaintiff's complaint is DISMISSED WITHOUT PREJUDICE.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Isidoro Rodriguez, Esquire, a member of the Virginia bar, alleges that he was contacted in 1988 and asked to represent Jack Harbeston, Sea Search Armada ("SSA"), Armada Company, and IOTA Partners in payloads of sunken treasure ships located off the coast of Columbia. (Compl. ¶91 13-18.) Through various agreements, Plaintiff's clients authorized Plaintiff to file and prosecute a lawsuit in Columbia on behalf of SSA, a limited partnership with an interest in the "San Jose," a sunken Spanish galleon. *(Id.* ¶91 20-22, 26-32.) After negotiating an appropriate legal strategy, Plaintiff negotiated with Danilo Devis Pereira, a Columbian attorney, whereby Mr. Pereira assisted Plaintiff in the prosecution of SSA's case in Barranquilla, Columbia. *(Id.* ¶91 23-26.) Plaintiff conducted some work from his office in Virginia, but also established a residence in Barranquilla, Columbia during his business relationship with Mr. Pereira; Plaintiff spent a substantial amount of time in Columbia. *(Id.* ¶ 22; P1. Br. in Supp. of Mot. for Leave to Conduct Deps.)

Plaintiff and Mr. Pereira first entered into an oral agreement to perform jointly the galleon work. Plaintiff and Mr. Pereira subsequently entered into two written agreements, which were executed in Columbia, whereby the parties modified the division of the proceeds from their work. *(Id.* ¶91 43, 45.) Plaintiff alleges that Mr. Pereira breached their contractual agreements and conspired with Plaintiff's former clients to cause tortious injury to Plaintiff.

Plaintiff filed this action against Jack Harbeston, Sea Search Armada, Armada Company, IOTA Partners, and Mr. Pereira on September 12, 2000. During the period between November 16, 2000 and November 22, 2000 all of the individuals and entities except Defendant Danilo Devis Pereira filed motions to dismiss for lack of personal jurisdiction. Judge James C. Cacheris granted the motions on December 21, 2000.[1] Judge Cacheris held that Plaintiff's Virginia State Bar affiliation alone did not amount to a sufficient connection to Virginia by the defendants to permit the court to exercise personal jurisdiction over the defendants. (Pl.'s Br. in Supp. of his Mot. for Leave to Conduct Nonparty Deps. at 6 n.8.) Judge Cacheris' ruling left Defendant Danilo Devis Pereira ("Defendant") as the sole remaining defendant in this case.

On February 15, 2001, having recognized Defendant's failure to appear in this case, Judge Claude

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[1]Plaintiff appealed these dismissals to the Fourth Circuit Court of Appeals on January 16, 2001.

M. Hilton scheduled a hearing for March 16, 2001 to consider whether to enter a default against Defendant. Plaintiff then filed a motion to stay the default proceeding, and noticed the motion for the March 16th hearing date. At the hearing on the issue of entry of default, Magistrate Judge Theresa C. Buchanan took the issue of entry of default and Plaintiff's motion for stay under advisement and asked Plaintiff to submit to the court a memorandum addressing, among other things, the grounds for the Court's personal jurisdiction over Defendant. On March 29, 2001, Plaintiff filed a motion for leave to conduct nonparty depositions, which he noticed for a hearing on April 6, 2001. Plaintiff's accompanying memorandum included arguments in support of his motion for depositions and provided the requested information regarding the basis of the court's jurisdiction over Defendant. Judge Buchanan took Plaintiff's motions under advisement before the noticed hearing and ruled on the papers.

Judge Buchanan issued her Report and Recommendation on April 25, 2001. Judge Buchanan found that personal jurisdiction over Defendant was not proper in this Court because Defendant's contacts with Virginia do not satisfy any of the grounds for personal jurisdiction articulated in Virginia's long—arm statute. Therefore, Judge Buchanan recommended that Plaintiff's case be dismissed without prejudice. Plaintiff objects to Judge Buchanan's recommendation.

DISCUSSION

Standard of Review

Rule 12(b) (2) of the Federal Rules of Civil Procedure permits dismissal of an action in which the forum court lacks the requisite personal jurisdiction. FED. R. Civ. P. 12(b) (2). The Court must consider the pleadings and affidavits in a light most favorable to the plaintiff—here, Mr. Rodriguez. *See Compuserve, Inc. v. Patterson,* 89 F.3d 1257, 1262 (6th Cir. 1996) . For a 12(b) (2) motion, the Court does not weigh the controverting assertions of the party seeking dismissal; the Court need only find that Plaintiff has made a prima facie showing of jurisdiction. See id.

Analysis

Personal jurisdiction over Defendant is not proper in this forum. Under Virginia law, the Court may exercise personal jurisdiction over a party if: (1) the facts and circumstances of the case fall within the reach of the Virginia's long-arm statute, *see* VA. CODE 8.01—328.1(A); and (2) the exercise of personal jurisdiction does not offend due process. *See, e.g., Heathmount A.E. Corp. v. Technodome.com,* 106 F. Supp. 2d 860, 864 (E.D. Va. 2000); *Robinson v. Egnor,* 699 F. Supp. 1207, 1211-12 (E.D. Va. 1988) (citing *Blue Ridge Bank v. Veribanc,* 755 F.2d371, 373 (4th Cir. 1985)). If jurisdiction is not appropriate under the first prong of the test, the Court need not analyze the facts of the case under the second prong of the test.

The Court finds that the exercise of personal jurisdiction over Defendant is not proper in Virginia because the facts of this case do not fall within the reach of the long-arm statute. The Virginia long-arm statute

provides in relevant part:

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

1. Transacting any business in this Commonwealth;

2. Contracting to supply services or things in this Commonwealth;

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.

VA. CODE § 8.01-328.1. Plaintiff asserts that personal jurisdiction over Defendant is proper under (A) (1) and A(4) of Virginia's long-arm statute. (Pl.'s Exceptions to Rpt. and Recommendation at 5.) However, the circumstances surrounding this case do not permit jurisdiction under either subsection.

There is no evidence that Defendant transacted business in Virginia. See VA. CODE § 8.01-328.1(A) (1). There is no indication that Defendant ever traveled to Virginia or physically occupied an office here.[2] In fact,

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[2]The Letterhead for "Devis & Rodriguez, Attorneys andCounselors at Law" bears a Columbian address, (Compl. Ex. 7);Defendant and Plaintiff signed

Plaintiff only argues that Defendant litigated and negotiated with the Republic of Columbia while *Plaintiff* resided in Virginia. The basis of Plaintiff's argument that Defendant "transacted business" in Virginia is Defendant's association with Plaintiff while Plaintiff was in Virginia. However, Defendant maintained his offices in Columbia and performed his duties as Plaintiff's associate while in Columbia. Moreover, the evidence before the Court demonstrates that a great deal of Defendant's contacts with Plaintiff took place while Plaintiff himself was in Columbia. (Compl. Exs. 7 10 11 13 15 17, etc.) Mere association with Plaintiff, a Virginia resident, does not amount to "transacting . . . business" in this Commonwealth." VA. CODE § 8.01—328.1(A) (1).

Jurisdiction over Defendant is also improper on the grounds that Defendant supposedly caused tortious injury in this Commonwealth by an act or omission outside this Commonwealth while Defendant regularly conducted business, or engaged in any other persistent course of conduct, or derived substantial revenue from services rendered, in Virginia. See VA. CODE § 8.01-328.1(A) (4). Defendant's alleged breach of his contract, breach of fiduciary duty, and interference with Plaintiff's lien may amount to "causing tortious injury" in this forum; however, Defendant did not engage in any persistent course of conduct in Virginia. Again, Plaintiff

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the January 3, 1991, March 15,1991, and May 6, 1991 legal services agreements in Columbia;Plaintiff and Defendant also signed Plaintiff's powers ofattorney in Columbia *(Id.* Ex. 15, 17.), etc.

argues that Defendant's association and agency with Plaintiff amounts to a persistent course of conduct from which Defendant derived "substantial revenue." There is no indication that Defendant engaged in any continuous or systematic contact with Virginia, either through business or otherwise. Defendant's principal place of business was not in Virginia, nor did Defendant seek out Virginia as a business forum. Plaintiff extended himself through Defendant so that Plaintiff could provide services in Columbia, not vice versa. Plaintiff notes that Defendant acted as agent for Plaintiff. (Pl.'s Exceptions at 8.) Therefore, Plaintiff availed himself of an opportunity to transact business in Columbia through his agent; Defendant did not use Plaintiff as an agent to conduct business in Virginia. *See, e.g., Hanson v. Denckla,357* U.S. 231, 253 (1958) (holding that the principal inquiry is whether the nonresident purposefully availed himself of the privilege of conducting business in the forum state, thus invoking the benefits and protections of the forum state's laws) . Moreover, Defendant did not have continuous or persistent contact with Virginia to perform revenue-producing services here. See VA. CODE § 8.01—328.1(A) (4) . Instead, Plaintiff formed the relationship with Defendant so that Plaintiff could have a business contact and means for Plaintiff to monitor his revenue-producing business relations in Columbia. Therefore, there is no indication that Defendant regularly associated himself with Virginia to solicit business here or derive revenue from Virginia. *See id.* Consequently, this Court may not properly exercise personal jurisdiction over Defendant.

Plaintiff argues that it should be clear that

Defendant has sufficient contact with Virginia to warrant the exercise of jurisdiction over Defendant because Plaintiff has a viable claim for an attorney's lien under Virginia law. (Pl.'s Exceptions at 10—12.) However, Plaintiff conflates a finding of a viable cause of action with a finding of proper jurisdiction. *(Id.* at 11-12 (arguing that the magistrate judge did not have jurisdiction to review the State Bar's Legal Ethics Opinion that Plaintiff could sue to protect his statutory attorney's lien); *id.* at 13-14. (arguing that Virginia's long-arm statute necessarily permits personal jurisdiction to enforce Virginia' s attorney' s lien) .) Findings of a viable cause of action and proper jurisdiction are separate and distinct. *See* FED. R. Civ. P. 12(b) (2), 12(b) (6) (permitting dismissal of a claim on the separate, and alternative, grounds that (1) jurisdiction is not proper over the alleged offender, or (2) the pleader has not pled facts supporting a claim for which relief can be granted) . Therefore, it is not sufficient that Plaintiff has demonstrated that he may be entitled to judgment on his claim to enforce his attorney's lien. (Dec. 6 Affidavit of Isidoro Rodriguez, Ex. 6: Virginia State Bar Legal Ethics Opinion #1325 at 3 (opining that it would not be ethically prohibited for an attorney to bring an action against his client for past—due attorney's fees and costs).)[3] Plaintiff must <u>*also*</u> demonstrate that jurisdiction

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[3]Notably, Plaintiff cites the Virginia Bar Ethics Opinion as indicating that the Virginia Bar advised Plaintiff that he could sue Defendant, Plaintiff's former "law partner," for Plaintiff's attorney's lien. (P1.'s Exceptions at 12 —13.) However, the Ethics Opinion demonstrates that Plaintiff did not alert the Bar of his

over Defendant is proper in this Court. As indicated above, Plaintiff has not demonstrated that jurisdiction over Defendant is proper here.

For these reasons, the Court finds that the recommendation of dismissal is supported by Defendant's lack of sufficient contacts with this jurisdiction. The Court further finds that amendment to the pleadings will not cure the jurisdictional deficiency. Therefore, it is hereby

ORDERED that Magistrate Judge Buchanan's Report and Recommendation is ADOPTED. It is further

ORDERED that Plaintiff's claims against Defendant are

DISMISSED WITHOUT PREJUDICE.

The Clerk is directed to forward a copy of this Order to *pro* se Plaintiff and Defendant.

Entered this 5th day of June, 2001.

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desire to sue Defendant, only of his desire to sue his former "client." (Ethics Opinion #1325 at 3.) Nothing in the Ethics Opinion makes reference to the exercise of jurisdiction over Defendant, or that suit would be proper against Defendant in any particular jurisdiction, if at all. In fact, the Bar was under the impression that Defendant would bring a suit similar to Plaintiff's against the former client, not that Defendant would be a named defendant in Plaintiff's suit. *(Id.* at 2.)

----------/s/----------
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/05/01

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 14, 2001

No. 01-1129
CA-00-1523-A

ISIDORO RODRIGUEZ

Plaintiff - Appellant

v.

JACK HARBESTON; SEA SEARCH ARMADA;
ARMADA COMPANY; IOTA PARTNERS

Defendants - Appellees

and

DANILO DEVIS PEREIRA

Defendant

ORDER

The Appellee has filed a motion to dismiss and the Appellant has filed a response.

The Court grants the motion.

Entered at the direction of Judge Luttig with the concurrence of Judge Motz and Judge King

For the Court

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ISIDORO RODRIGUEZ, ESQ., Plaintiff, v. DANILO DEVIS PEREIRA,[1] Defendant.	)	) Civil Action) No. 00-1523-A

REPORT AND RECOMMENDATION

The Court was faced with the matter addressed herein upon the plaintiff's filing of two motions. On March 7, 2001, plaintiff filed a "Motion Pursuant to Right to Due Process, Provisions of Inter-American Service Convention, and Federal Rules of Civil Procedure Effective December 1, 2000, for a Stay of Default Proceeding Pending Discovery of Non-Party Witnesses and Service of Process in Accordance with Said Treaty so to Assure Enforcement of a Default Judgment in the Republic of Colombia" (hereinafter, "Motion for Stay of Default Proceeding"). On March 29, 2001, plaintiff filed a

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[1]The former lead defendant, Jack Harbeston, was dismissed from the case.

"Motion for Leave to Conduct the Immediate Depositions of Nonparty Witnesses Regarding the Status of His Perfected Virginia Statutory Attorney's Lien" (hereinafter, "Motion for Leave to Conduct Nonparty Depositions"). The undersigned Magistrate Judge has taken both of these motions under consideration.

I. PROCEDURAL HISTORY

On September 12, 2000, plaintiff filed this action against defendants Jack Harbeston, Sea Search Armada, Armada Company, IOTA Partners, and Danilo Devis Pereira. During the period of November 16, 2001, through November 22, 2001, four of the five defendants - Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners - filed motions to dismiss for lack of personal jurisdiction. On December 21, 2000, the Honorable James C. Cacheris, stating from the bench that the plaintiff's Virginia State Bar affiliation alone was not a sufficient connection to establish the Court's personal jurisdiction over the defendants, (Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. p. 6 n.8), granted all four of these motions to dismiss, thereby leaving Danilo Devis Pereira as the sole remaining defendant in this case. On January 16, 2001, plaintiff appealed these dismissals to the Fourth Circuit Court of Appeals.

On February 15, 2001, having recognized defendant Pereira's failure to appear, the Honorable Claude M. Hilton scheduled a default hearing for March 16, 2001. On March 7, 2001, plaintiff filed his Motion for Stay of Default Proceeding, which he noticed for a hearing on March 16, 2001. At the hearing, Judge

Buchanan took this motion under advisement and asked plaintiff to submit to the Court a memorandum addressing, among other things, the grounds for the Court's personal jurisdiction over the defendant. On March 29, 2001, plaintiff filed his Motion for Leave to Conduct Nonparty Depositions, which he noticed for a hearing on April 6, 2001, and an accompanying memorandum containing both the arguments in support of this motion and the supplementary information requested by Judge Buchanan on March 16, 2001. Having decided to rule on the papers, the undersigned took this motion under advisement before the noticed hearing.

II. FACTUAL BACKGROUND

Plaintiff, a member of the Virginia Bar, alleges that he was contacted in 1988 and asked to represent the interests of the former defendants (Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners) in payloads of sunken treasure ships located off the coast of Columbia. (Compl. ¶¶ 13-18.) Plaintiff claims that, through various agreements, he was authorized to file and prosecute a lawsuit in Columbia on behalf of former defendant SSA, a limited partnership with an interest in the *San Jose,* a sunken Spanish galleon. (Id.¶¶ 20-22, 26-32.) According to plaintiff, after developing an appropriate legal strategy, he negotiated an agreement with defendant Pereira, a Columbian attorney, whereby defendant assisted plaintiff in the prosecution of defendant SSA's case in Barranquilla, Colombia. (Id. ¶ ¶ 23-26.) Plaintiff alleges that defendant breached this agreement and conspired with the former defendants to cause further tortious injury to plaintiff. (Id. ¶¶ 60-64;

Pl.'s Br. In Supp. Of His Mot. For Leave to Conduct Nonparty Deps. at 14-15.)

III. ANALYSIS

Upon a full review of the pleadings and other pertinent submissions, the undersigned Magistrate Judge finds, for the following reasons, that the Court does not have jurisdiction over the defendant.

According to plaintiff, defendant has three contacts with the State of Virginia. First, defendant and plaintiff, a Virginia resident[2] and attorney, allegedly entered into an oral agreement whereby they associated for the purpose of providing legal services to defendant SSA in Columbia and agreed to equally split the costs of and proceeds from their work. (Compl. ¶¶ 23-25; Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. at 13-14.) Pursuant to two subsequent written agreements, dated March 15, 1991, and May 6, 1991, which were executed in Columbia, the parties supposedly modified the division of proceeds from their work from a fifty-fifty split to a eighty— twenty split in favor of defendant. (Compl. ¶¶ 43, 45, Ex. 11, Ex 13.) Second,

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[2]Although plaintiff claims to have been domiciled in Virginia during the pendency of his business relationship with defendant, he established a residence in Barranquilla, Columbia, in or around 1988, and obtained a Columbian resident visa in 1993. (Compl. ¶ 22; Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. at 5.)

plaintiff claims that through this relationship, defendant benefitted financially from his business contacts to plaintiff, a Virginia resident and attorney. (Pl.'s Br. In Supp. Of His Mot. For Leave to Conduct Nonparty Deps. at 13-15) Finally, plaintiff contends that defendant breached their business agreement and a fiduciary duty owed thereunder as an agent of plaintiff, a Virginia resident and attorney. (Id. At 13, 15-16)

The burden is on the plaintiff to show by a preponderance of the evidence that the Court has personal jurisdiction over the defendant. This burden is carried by the satisfaction of a two-step inquiry. See Mylan Laboratories, Inc. v. Akzo, N.V., 2 F.3d 56, 60 (4th Cir. 1993); Roche v. Worldwide Media, Inc., 90 F. Supp.2d 714, 716 (E.D. Va. 2000) . First, the plaintiff must show that Virginia's long-arm statute reaches the defendant. Second, the plaintiff must show that the requested exercise of personal jurisdiction is consistent with the due process clause. See Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp.2d 860, 864 (E.D. Va. 2000); America Online, Trio. v. Huang, 106 F. Supp.2d 848, 853 (E.D. Va. 2000); Rannoch, Inc. v. Rannoch Corp., 52 F. Supp.2d 681, 684 (E.D. Va. 1999).

Even assuming they have been accurately depicted by plaintiff, defendant's contacts with Virginia do not satisfy either prong of the personal jurisdiction inquiry. First, defendant's contacts do not satisfy any of the grounds for personal jurisdiction enunciated in Virginia's long-arm statute. See Va. Code § 8.01-328.1 (Michie 2000). Second, the Court's exertion of personal jurisdiction over the defendant would offend the

"traditional notions of fair play and substantial justice," thereby violating the due process clause. International Shoe Co.v. Washington, 326 U.S. 310, 316 (1945). This is because the defendant did not reach into Virginia and purposefully avail himself of the laws of this jurisdiction. See id. at 319. Rather, plaintiff appears to have reached into Columbia for defendant to secure his services and perform work with him in Columbian courts. Therefore, plaintiff has not shown by a preponderance of the evidence that the Court has personal jurisdiction over the defendant.

IV. RECOMMENDATION

The undersigned Magistrate Judge therefore recommends that plaintiff's case be dismissed without prejudice on the ground that the Court does not have personal jurisdiction over the sole remaining defendant, Danilo Devis Pereira.[3]

V. NOTICE

The parties are advised that exceptions to this Report and Recommendation, pursuant to 28 U.S.C. § 636 and Rule 72(b) of the Federal Rules of Civil Procedure, must be filed within ten (10) days of its service. A failure to object to this Report and Recommendation waives appellate

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[3]The undersigned Judge will hold plaintiff's Motion for Stay of Default Proceeding and Motion for Leave to Conduct Nonparty Depositions under consideration until the Court acts on this Report and Recommendation.

review of any judgment based on it.

The Clerk of the Court is directed to send a copy of this Report and Recommendation to all counsel of record, and to the defendant at the following address:

Danilo Devis Pereira
Abogado
Carrera 51 No 79-34
Oficina 403
Barranquilla, Colombia

/S/
THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

April 25, 2001
Alexandria, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISODORO RODRIGUEZ
Plaintiff,

-vs-

C.A. No.
00—1523—A

JACK HARBESTON, et al.,

Defendants.

HEARING ON MOTIONS

December 21, 2000

Before: James C. Cacheris, Judge

APPEARANCES:

Isodoro Rodriguez, Pro se

R.Harrison Pledger, Jr., Counsel for the Defendants

THE COURT:Good morning.

MR. RODRIGUEZ: Good morning, Your Honor.

THE CLERK: Civil action 00-1523-A, Isodoro Rodriguez versus Jack Harbeston.

Are counsel ready to proceed?

THE COURT: Good morning, Mr. Pledger.

MR. PLEDGER: Good morning, Your Honor. I am Harrison Pledger, for the record. And I believe this comes on this morning on my motions.

THE COURT: Okay. You represent the IOTA Partners, Sea Search, Armada Company--

MR. PLEDGER: Armada Company.

THE COURT: And the--

MR. PLEDGER: And Jack Harbeston.

THE COURT: Harbeston, yeah. The only one you don't represent, I think, is probably Mr. Devis, is that correct?

MR. PLEDGER: That is correct, sir.

THE COURT: Okay. All right. Go ahead, sir.

MR. PLEDGER: I have filed motions in this case on behalf of those four defendants to dismiss this action on the basis of a lack of jurisdiction in this court.

The underlying issue is a contract that was entered into by Sea Search Armada-

THE COURT: That was in Idaho, is that right?

MR. PLEDGER: Well, the contract was entered into between Colombia and Idaho, although I believe there was an acknowledgment that took place in the District of Columbia in the Colombian Embassy there. But the contract was with the Devis and Rodriguez law firm, which was a law firm in Colombia. And it was entered into in 1988. It called for an hourly fee arrangement. Subsequently was modified in 1989 to a contingent fee agreement.

The issue that is before this Court is whether the fact that an attorney is admitted to the Bar of a certain state, does that give the courts of that state jurisdiction over clients of that law firm based solely on the fact that that attorney has been admitted to the Bar in that state. There are no other contacts.

And as you read--

THE COURT: Okay. I think what he argues is they definitely wanted, your clients wanted a member of the Virginia Bar, I think that's what he said.

MR. PLEDGER: Well, I think if you look at his complaint, it doesn't quite square with that kind of a concept because what he states in I believe paragraph--

THE COURT: I think in his opposition he is a

little bit more forceful with that.

MR. PLEDGER: Well, in the complaint what he states is that there was a call from the United States Embassy in Bogota discussing the possibility of representing the Sea Search Armada, and that's in paragraph 13.

He goes on to state that they were seeking, in paragraph 15, that the U.S. Commercial Counsel stressed that defendant Sea Search Armada were only interested in discussing representation with an active licensed attorney from the United States because Colombia does not have a Bar association with an Ethics Committee oversight.

THE COURT: But he also wrote to the Ethics Committee, I think, did he not, about the contingent fee arrangement?

MR. PLEDGER: He did indeed. Apparently when there came some conflict over fees and there was an issue as to whether he could withdraw and how they might withdraw, then he wrote Virginia and asked them for an ethics opinion as to how he might withdraw in this dispute over a fee arrangement. As I say, that goes way back. And you wind up with an agreement that was finally entered in 1991, I believe, for a contingent fee agreement. The contingent fee would be based upon some kind of recovery by Sea Search Armada. There has been no recovery by Sea Search Armada.

So, if you ever get into the merits of the case, it would appear to be a case that has no merit because there

has been no recovery so there may not--

THE COURT: This is basically a salvage case, is that correct?

MR. PLEDGER: It is a salvage case, apparently dealing with a sunken Spanish galleon off the coast of Colombia.

THE COURT: It is worth -- and the treasure is worth somewhere in two to ten billion, something of that nature, that is what is alleged here.

MR. PLEDGER: That is what is alleged. I have no idea because, as far as I know, nobody has ever recovered anything and the battle with the Colombian government continues to today.

But there are several issues, as I see it, raised by this. One, he has sued the Armada Company, and they are not a part of the contract that was entered into. That was simply Sea Search Armada.

He has sued IOTA Partners, and they are not a part of that contract.

And he has sued Jack Harbeston, apparently in an individual capacity. And the only connection Mr. Harbeston had was that he acted as the executive officer of Sea Search Armada in executing the contract for legal services.

But I don't believe the mere fact that -- even if,

even if we accept for the purposes of an argument that they wanted a Virginia attorney, I don't believe the fact that that was part of or the sole reason for hiring Mr. Rodriguez--

THE COURT: Okay, I understand your argument. Okay.

MR. PLEDGER: All right, sir. If you have any questions, I will be happy to answer those.

THE COURT: All right. Okay.

Mr. Rodriguez, I will hear your response, sir.

MR. RODRIGUEZ: Good morning, Your Honor. Isodoro Rodriguez.

THE COURT: Good morning.

MR. RODRIGUEZ: The issues seem to be somewhat obfuscated. To clarify, IOTA Partners, Sea Search Armada, Armada Company and Jack Harbeston, who is the managing director and executive officer for all three entities, have one sole asset, and that is the treasure ship targets of f the coast of the Republic of Colombia.

When these were discovered between 1980 and '82 by another partner of this conglomerate of companies, they were declared the finder of these various targets. And from 1982 until 1986 they attempted to negotiate the recovery per the contract that they had envisioned with the Republic of Colombia.

And what the Republic of Colombia did in 1986 was to pass an act to retroactively change the finder's fee from a 50/50 to a 95/5, and was in the process of negotiating with the government of Sweden under the former president of the Republic Barco's administration for the recovery of this ship and giving 5 percent to the U.S. citizens.

I had been general counsel for an Exxon coal mine project and was in transition–

THE COURT; Okay. What I am interested in is any Virginia connection tht you have.

MR. RODRIGUEZ: The connection– I was approached both by Mr. Harbeston and the U.S> Embassy because I, number one, was an experienced international lawyer and particularly with Colombia.

Number two, I was a Virginia attorney and a U.S. Citizen. And the reason–

THE COURT: You were practicing in Barranquilla, Colombia.

MR. RODRIGUEZ: No, I didn't have a practice--- In fact, my practice, I was developing a practice, international practice out of Alexandria, Virginia.

THE COURT: Okay.

MR. RODRIGUEZ: My office has been in Alexandria since 1979. And I only shut it done in 1993 when I obtained residency to live in Colombia. Up until then, I was on a visa commuting back and forth.

COURT: Okay. Are you a Colombian citizen or—

RODRIGUEZ: No, I am a U.S. citizen.

THE COURT: U.S. citizen, Virginia resident?

MR. RODRIGUEZ: A Virginia resident, U.S. citizen. I have been a member of the Virginia Bar. And the reason why this was all very pivotal, just like other American companies seeking American counsel is because once you have an American counsel in Colombia who is designated as the legal representative, they are in turn given all the powers of the board of directors. In other words, all the powers that Sea Search Armada had with regard to, and it is part of the exhibits in the complaint, with regard to those treasure ship targets, I or any legal representative would have the right to relinquish.

And so, therefore, they needed the fiduciary and the fidelity of an America lawyer which they could control. And that was always understood.

THE COURT: It wouldn't have made any difference had you been a member of the New York Bar, D.C. Bar or whatever. Okay.

MR. RODRIGUEZ: Nebraska Bar, whatever. It is normal in large international projects— In fact, between 1980, after I left the White House administration, between 1982 to 1983 Morrison Knutson, who was a prime contractor of the Exxon project, had five times attempted

to get me a visa to work down in Colombia because they needed to have an American counsel because they needed to have that type of security, which then had oversight over the Colombia lawyers.

And that is why there was a nexus and that's why I accepted the contract and at that time formed an association with the Colombian lawyer, who I thought who had fidelity, or semper fi as we say in the Marine Corps, because I saved his life.

THE COURT: Is that Mr. Devis?

MR. RODRIGUEZ: Mr. Devis.

THE COURT: Yeah, D-e-v-i-s for the record. Okay, go ahead--

MR. RODRIGUEZ: I am sorry, Mr. Danilo Devis for the record.

And so, I associated with Mr. Devis for this specific joint venture to deal with the litigation against the Republic of Colombia. Which, as a U.S. citizen, placed me in a very unique and dangerous situation. And which was one of the reasons why I sent a letter to the Virginia Bar because around that time, back in 1990, Mr. Harbeston had sent, without advising me, a very defamatory letter to the Republic of Colombia. And I was, we all were concerned because of the retaliations.

And so, I sent the letter to the Virginia Bar because they wanted the fiduciary relationship. And if I

renounced my position as legal representative, the entire lawsuit would have been dissolved because they would not have had the jurisdiction to maintain the lawsuit. That was the first issue that had to be resolved by the Court in the 1994 decision, whether or not there was jurisdiction of this foreign company, Sea Search Armada, IOTA Partners, the Armada Company, to have that lawsuit.

And the reason--

THE COURT: And you agree, none of those, including Harbeston, are Virginia residents or companies? Do you agree- -

MR. RODRIGUEZ: The Armada Company and Sea Search Armada are Cayman Island companies. IOTA Partners is a limited partnership out of Idaho. Mr. Harbeston's managing company that runs IOTA Partners is out of the state of Washington.

THE COURT: Okay. What is your theory under the Long Arm Statute then? Is it making a contract to provide services causing tortious injury? What is your theory there?

MR. RODRIGUEZ: There are two theories. There is a contract that provided -- not only provided service, but maintained a fiduciary relationship to maintain this lawsuit until--

THE COURT: Okay. The contract was signed either in Colombia or Idaho, right?

MR. RODRIGUEZ: It was signed actually, there was initial contract that was signed by Mr. Harbeston which was later incorporated by the board of directors of Armada Company in the Cayman Islands, which in turn was notarized and officiated in Washington, D.C. and sent down, as well as the powers of attorneys that were given to me. Because there were two things, there was the power of attorney and the contract, because the contract was-- I mean, there are a lot of Isodoro-- There are not that many Isodoro Rodriguezes, but there are a lot of Rodriguezes in Colombia that they could have hired. But they needed to have an American lawyer who resided there.

THE COURT: I know what you mean.

MR. RODRIGUEZ: And so, that duty that I had to maintain the integrity of Sea Search Armada, which was the only essence-- Because if you look at the IOTA memorandum, which is part of my documents showing the interrelationships of all of these entities, that was the only item of value, was the treasure ship targets. There were eight targets.

The reason why we say eight is because back in 1980-'82 there was not the sophisticated way, except for in the naval sphere, for treasure ships to be specified specifically where the target is vis-a-vis surface locations, satellite locations 700 meters or 700 feet below the surface. So, there was the seven targets that we were looking at.

Now, the problem generated was that after 1994,

winning the first case that confirmed jurisdiction and the appeals case in 1997, then when president Pastrana became the president of Colombia in 1998, they began negotiations. And in 1998, that's when this partnership and my law partner or this group of companies cut off communications with me.

And when I requested between 1998 and 1999, because at that time I was also being subject by the guerrillas for kidnapping, and it was a very precarious situation for me, I noted--

THE COURT: I have read your pleadings.

MR. RODRIGUEZ: So, the issue-- I did not want to leave Colombia and then loose the value of the asset or the contract and the value of the litigation from my client. And that's why finally I had to file this lawsuit, to get an opinion as to, number one, the current status of my contract because it is doubtful Mr. Harbeston--

THE COURT: All right, I understand your argument.

MR. RODRIGUEZ: Thank you, Your Honor.

THE COURT: Okay. This matter is before the Court on defendants' motions to dismiss for lack of personal jurisdiction. It's all the defendants, basically, except Mr. Devis.

The defendants in this matter were engaged in deep-sea exploration aimed at locating and salvaging the wreck of the galleon San Jose, which sunk off the coast of the

Republic of Colombia in 1707. The ship is believed to carry at least two billion in treasure and possibly much more. The plaintiff, Mr. Rodriguez, is a U.S. citizen, a member of the Virginia State Bar, and was contacted while he was in Colombia and retained with his law partner, Danilo Devis Pereira, P-e-r-e-i-r-a, to perform certain legal tasks in Colombia on behalf of the other defendants, including filing suit in a Colombian court against the Colombian government. The plaintiff alleges he was not fully paid for his services.

The defendants filing motions to dismiss are Sea Search Armada, (SSA), a limited partnership organized under the laws of the Cayman Islands, which holds title to the San Jose; Armada Company, also organized under the laws of the Cayman Islands and the managing general partner of SSA; IOTA Partners, an Idaho limited partnership selling investment shares in SSA's interest in the San Jose; and Jack Harbeston, H-a-r-b-e-s-t-o-n, a resident of the state of Washington, who is managing director of SSA, president of Armada and general partner of IOTA Partners.

A 12(b)(2) motion to dismiss states that the Court lacks sufficient jurisdiction over the defendant's person to exercise judicial power over him. Where a nonresident over whom jurisdiction is asserted has established certain minimum contacts with a forum, such that requiring him to defend interests in the forum would not offend traditional notions of fair play and substantial justice, and where such person has purposely availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of state laws,

jurisdiction will be upheld. See Peanut Corporation of America versus Hollywood Brands. Inc., 696 F.2d 311, 314, Fourth Circuit, 1982 case.

The Court makes a twofold inquire into the validity of an assertion of in personam jurisdiction over a nonresident defendant. Jurisdiction is proper only if, one, a state statute provides authority for the assertion of jurisdiction and, two, the assertion of jurisdiction under the particular facts does not offend the due process clause of the Fourteenth Amendment to the United States Constitution. August v. HBA Life Insurance Company, 734 F.2d 168, 170, Fourth Circuit, 1984.

Virginia has described its Long Arm Statute, Virginia Code 8.01-328.1, as asserting in personam jurisdiction to the full extent permitted by due process. Danville Plywood Core. v Plain & Fancy Kitchens. Inc.,218 Virginia 533, 238 S.E.2d 800, 802, 1977 case.

And then the Long Arm Statute provides a number of situations such as personal jurisdiction over a person who acts directly by an agent so as to cause — to a cause of action arising from the person when transacting any business in the Commonwealth; two, contracting to supply services or things in the Commonwealth; three, causing tortious injury by an act or omission in this commonwealth; four, causing tortious injury in this Commonwealth by an act or omission outside the Commonwealth if he regularly does or solicits business, or engages in any other substantial course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth.

When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in.. this section may be asserted against him. That is Code Section 8.01—328.1 (2000).

The burden is on the plaintiff to show by a preponderance of the evidence that the defendants' acts placed them within the reach of the Long Arm Statute. Marshall Exports. Inc. v. Phillips, 507 F.2d 47, page 49, Fourth Circuit, 1974.

Mr. Rodriguez only specifically alleges that he entered into contracts with defendant SSA and Devis, who has not filed a motion to dismiss.

Mr. Rodriguez alleges that defendant Harbeston, acting on behalf of defendant Armada, later ratified his original agreement with SSA. However, none of these contracting actions took place in Virginia.

Mr. Rodriguez does not allege that any defendant regularly transacts business in Virginia or contracted to supply things or services in Virginia.

The plaintiff Rodriguez contends the defendants chose him to conduct their affairs in Colombia precisely because he is a member of the Virginia Bar. The complaint is inconsistent on this point.

Defendant SSA had apparently had a prior negative experience with a Colombian attorney, so it sought to retain a member of a U.S. state Bar with the attendant ethics requirements.

Mr. Rodriguez' complaint observes that the Commercial Counsel for the United States Embassy in Bogota, Colombia contacted him after learning that defendant SSA was interested in securing the services of, quote, an active licensed attorney from the United States, unquote, not specifically from Virginia.

Mr. Rodriguez further alleges that the U.S. Commercial Counsel's recommendation of him to defendant SSA partly is because he was a member of the Virginia State Bar, but this obviously does not mean defendants had such a specific requirement.

Moreover, even if defendants did choose to retain Mr. Rodriguez because of his Virginia State Bar affiliation, this alone is not a sufficient connection to Virginia to establish this Court's personal jurisdiction over defendants under the Long Arm Statute.

As noted above, the defendants did not transact any business in the Commonwealth, nor did they contract to supply services or things in Virginia, nor do they regularly transact business in Virginia.

Mr. Rodriguez was contacted by defendant Harbeston while Mr. Rodriguez was in Colombia, where he has an office, not in Virginia. Any litigation work to be performed by Mr. Rodriguez related to the Republic of Colombia, not the Commonwealth of Virginia.

Further, the defendants have not caused tortious injury by any act or omission in Virginia because their contacts with Mr. Rodriguez have all occurred outside of

Virginia, either in the Republic of Colombia, Idaho, Seattle, Miami or Washington, D.C.

There is no nexus to the Eastern District of Virginia beyond the bare allegations that the defendants selected Mr. Rodriguez because of his Virginia State Bar membership. This is not sufficient under the Long Arm Statute.

Again, the plaintiff bears the burden of defeating a motion under Rule 12(b) (2). Mr. Rodriguez has not shown by a preponderance of the evidence that the defendants selected him to represent them in Colombia because he was a member of the Virginia State Bar as opposed to some other official United States Bar association.

And even if Mr. Rodriguez had established that connection, it would be too tenuous a link to Virginia to allow this Court to exercise authority over the defendants within the limits of the due process clause.

For the foregoing reasons, defendants' motions are granted.

And also in light of this Court's ruling, the defendant's motion for sanctions is denied as moot. So, you won't have to come back tomorrow.

Okay. Thank you very much.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

COPY

Norman B. Linnell, CP, CM, CE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ISIDORO RODRIGUEZ,ESQ.)		
	)	
Plaintiff,	)	Case No. CA-001523-A
	)	
v.	)	
	)	
JACK HARBESTON, ET AL	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in open Court, it is hereby ORDERED that:

1) The Motions to Dismiss of Defendants Jack Harbeston, Sea Search Armada, Armada Company, and Iota Partners are **GRANTED** without prejudice;

2) Plaintiff's Motion for Sanctions under Rule 11 is **DENIED** as moot;

3) the action against Defendant Danilo Devis Pereira remains; and

4) the Clerk shall forward copies of this Order

to all parties and counsel of record.

December 21st, 2000
Alexandria, Virginia

/S/
UNITED STATES DISTRICT COURT JUDGE

[SEAL]

50 Years Public Service
Virginia State Bar
1938-1988

VIRGINIA STATE BAR
Tenth Floor, Ross Building, 301 East Main Street
Richmond, Virginia 2319 (804)786-2061

(804)736-5966 (Voice/TDD)

STANDING COMMITTEE ON LEGAL ETHICS

February 27; 1990
PERSONAL AND CONFIDENTIAL

Isidoro Rodriguez C., Esquire
Calle 84 No. 56-51
Piso 2, Oficina 4
Barranquilla, Colombia S.A.

Re: Legal Ethics Opinion # 1325

Dear Mr. Rodriguez:

I am writing in response to your letter dated January 3, 1990, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on the Legal ethics ("committee").

You have advised that, although you are a member of the Virginia State Bar, you reside and practice in a South

American country. You further indicate that you entered into an agreement, which was executed in Idaho, to represent a foreign corporation in the negotiation, settlement, and/or litigation against a foreign government resulting from the corporation's claim as finder of a shipwreck which contained an estimated $3 billion in treasure. The agreement provided for an hourly fee rate, costs, and monthly detailed invoices and was affirmed by the corporation's Board of Directors which also named you as Legal Representative for the corporation. You have described for the committee that a Legal Representative In the country in which you practice is distinct from an attorney at law and is the commercial. representative for the company in that country with all of the corporate powers of the Board of Directors and all, of the potential individual liability. Furthermore, such a Legal Representative is not required to be an attorney at law. Subsequent to those corporate actions, you were authorized to bring a legal action against the foreign government and you authorized your then-law partner, which partnership has subsequently been dissolved, to file the suit as Attorney of Record. The facts you have provided indicate that the suit was filed shortly after you authorized your partner to do so.

You indicate that, although much time has been expended on the case and the corporation repeatedly expressed satisfaction with the work being performed by your firm, the corporation has failed to comply with its contractual agreement to pay invoices after they were presented. Specifically, the corporation agreed to pay $10,000 approximately two months after suit was filed and an additional $50,000 within 30 days thereafter. The first payment ($10,000) was made as scheduled, but no further payments have been made by the corporation. Subsequent to

that first payment, the corporation requested a contingent fee agreement be submitted for consideration; such a contract was prepared and submitted, but the corporation has not responded.

In addition to the failure to pay fees, you indicate that the corporation, without your knowledge, sent a defamatory letter against the foreign government which then prepared an official protest to the United States Embassy. You indicate that the letter accused the government and unnamed officials of criminal acts, subjecting you, as the corporation's Legal Representative, to civil liability and both you and your former law partner to physical danger.

As a result of both issues, failure to pay fees and costs owed and the defamatory latter, you requested that the corporation retain a new Legal representative and a new attorney. You indicate that to date you have not received any response from the corporation's Board of Directors.

Finally, you advise that under the law and professional norms of the foreign government, your former lev partner has a right to unilaterally and voluntarily withdraw from the litigation, without any requirement to seek permission of the trial court. You indicate that he may also file a civil suit against the corporation for monies owed during or after litigation. Your former partner has not exercised those rights pending your receipt of this informal advisory opinion.

You have asked that the committee opine as to the propriety of your renunciation of your fiduciary appointment as Legal Representative to the corporation in view of the non-payment of costs and fees owed and of the defamatory letter

sent by the corporation to the foreign government. You have further inquired as to the propriety of your instituting suit against the corporation for their non-payment of fees and costs owed.

The appropriate and controlling rules relative to your questions are DR l-102(A)(4) which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on [the] lawyer's fitness to practice law"; DR 2-l08(B)(2, 3, and 4) which proscribe the conditions which permit a lawyer to withdraw from representing a client; DR 2—108(C) which directs that counsel of record in a court proceeding may not withdraw except by leave of court after notice to the client of the time and place of a motion for leave to withdraw; and DR1-102(B) which instructs that a lawyer admitted to practice in Virginia is subject to the Virginia Code of Professional Responsibility although engaged In practice elsewhere, unless disciplinary rules of the foreign jurisdiction permit the activity [emphasis added].

The committee is of the opinion that the provisions of DR l-l02(A)4) embrace far more than an attorney's conduct in the context of an attorney/client relationship. Thus, the committee opines that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility. The committee thus specifically adopts the conclusions reached in ABA Formal Opinion 336. See also: State. v Freeman, 229 Kan. 639, 629 P.2d 716 (1981); and Committee on Professional Ethics v. Gross, 322 N.V2d 82

(Iowa 1982).

Virginia Disciplinary Rule 2-108(B), subsections (2), (3), and (4), directs that a lawyer may withdraw from representing a client if (2) the client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; (3) the client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. The committee is of the opinion that, under the facts you have provided, it would n6t be improper to move to withdraw as Legal Representative for the corporation. See also LEO #974. The committee understands, however, from your recitation of the facts, that such permission of the court is not required in the foreign country in which you practice. Under those circumstances, the committee directs your attention to DR 1-102(B) which, as noted above, would control. Therefore, if the professional norms in that country permit unilateral and voluntary withdrawal from representation without authorization by the court, it would not be improper for you to act accordingly.

The committee has earlier opined that there is no disciplinary rule ethically prohibiting an attorney from bringing an action against his client for past-due attorney's fees end costs. See LEOs #974 and 995. Guidance I available under Ethical Consideration 2-25 which urges that a lawyer should not sue a [current] client for a fee unless necessary to prevent fraud or gross imposition by the client. See LEO 11117. But see LEOs #1230 and 1257.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Very truly yours,

Kathleen O'Brien

Encl.
cc: C. Torrence Armstrong, Esquire
Willard M. Robinson, Jr., Esquire
Susan B. Spielberg, Esquire